United Nations AT/DEC/1217

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1217

Case No. 1308: LORIOT

Against : The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Brigitte Stern, Vice-President; Mr. Spyridon Flogaitis;

Whereas, on 18 August 2003, François Loriot, a staff member of the United Nations filed an Application containing pleas which read as follows:

"Part II: PLEAS

...

2.2 Preliminary and/or provisional measures

THE APPLICANT RESPECTFULLY REQUESTS THE TRIBUNAL,

...

2.2.2 ... TO ORDER ... oral proceedings ...

2.2.3 TO ORDER the production of the correspondence and the so-called preparatory studies for the establishment of the [Office of Legal and Procurement Support (OLPS)] and ... annexes ... to which the Respondent refers in his Reply ... and, failing that, to declare them null and void ...

2.2.4 TO AWARD the Applicant a rating of "1" for his Performance Appraisal Review (PAR) for 1998 should the Respondent fail to amend his assessment of the Applicant's performance ...

...

2.4 Compensation claimed under chapter III, article 7, paragraph 3 (d)

Compensation for covert disciplinary sanctions.

...

2.5 Other relief requested by the Applicant

THE APPLICANT RESPECTFULLY REQUESTS THE TRIBUNAL:

(a) *To recommend* to the Secretary-General the establishment of a protection mechanism to ensure the reliability, professionalism, integrity and independence of lawyers working within the administration of justice at the United Nations based on the *United Nations Basic Principles on the Role of Lawyers* and on the applicable practice in most national bars;

(b) *To recommend* ... that staff rule 112.3 and General Assembly resolution 51/226 (...) should be invoked against the [United Nations Development Programme (UNDP) and United Nations Population Fund (UNFPA)] officials guilty of serious misconduct, maladministration and negligence in this case;

(c) *To demand* that the Respondent issue a public apology to the Applicant ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 December 2003 and periodically thereafter until 30 June 2004;

Whereas the Respondent filed his Answer on 30 June 2004;

Whereas the Applicant filed Written Observations on 18 October 2004, and, on 29 October the Respondent commented thereon;

Whereas, on 8 November 2004, the Tribunal put questions to the Respondent;

Whereas, on 15 November 2004, the Respondent provided answers to the questions put by the Tribunal;

Whereas, on 19 November 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"*Employment History*

... The [Applicant] joined UNDP in 1992, at the P-5 level, to set up a legal unit at the Office of Project Services (OPS). In April 1994 he was appointed by the then [Under-Secretary-General for Administration and Management], to the post of Senior Legal Adviser, Department of Management. In March 1996 the [Applicant] was appointed to the post of Chief, Legal Section, at UNDP. In July 1998 the [Applicant] was promoted by the UNDP Administrator to the D-1 level. [On 1 October 2001, the Applicant was transferred to the Department of Economic and Social Affairs (UN/DESA) on reimbursable loan, where he remained until his retirement in 2003.]

Summary of the facts

... The [Applicant] claims that since September 1998, when he expressed his reservations about an irregularity in the appointment of the Deputy-Chief, Legal Section, UNDP, he has suffered from obstruction and harassment in the discharge of his duties.

... During his service with the [United Nations] as a Legal Officer at the P-5 level at UNDP, as [Senior Legal Adviser, Department of Management], and as the Chief, Legal Section, at UNDP at the D-1 level, his performance was highly rated.

... On 10 April 1999 the [Applicant] initiated a series of changes in the legal system of UNDP, which was backed up by other organs and external legal experts.

... In December 1999, the [Applicant], and [the P-5 Chief, Policy and Control Unit, Inter-Agency Procurement Services Office (IAPSO), Mr. S.,], were appointed by ... [the] Assistant-Administrator and Director, Bureau of Management, UNDP, to plan and design the organization of Office of Legal and Procurement Support (OLPS). During the process of reorganization, [the Assistant Administrator and Director, Bureau of Management], informed the [Applicant] in March 2000 that his post would be abolished and replaced by a P-5 level post. According to the [Applicant], neither analysis nor explanation was given for this organizational arrangement. An additional structural inconsistency within the reorganized OLPS was the downgrading of two supervisory positions from the D-2 level to the D-1 level.

... On 10 April 2000, the OLPS Director's post was opened for candidacy, and both the [Applicant] and [the Chief, Policy and Control Unit, IAPSO,] applied and were short-listed. According to the [Applicant], the circulation of the vacancy announcement was limited and unequally accessible.

... On 14 August 2000, [the Assistant Administrator and Director, Bureau of Management], announced the appointment of [the Chief, Policy and Control Unit, IAPSO,] to the new D-1 post, as Director, OLPS.

... On 12 October 2000, a request for administrative review of the appointment decision of the Director, OLPS, was sent by the [Applicant] to the UNDP Administrator.

... On 28 November 2000, a request under article 7.1 of the Statute of the ... Administrative Tribunal was made by the [Applicant] to the Secretary-General for a direct submission of this case to [the Tribunal]."

On 31 October 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 10 April 2003. Its considerations, conclusions and recommendations read, in part, as follows:

"*Considerations*

...

36. The Panel discussed the Appellant's claim that the vacancy announcement failed to conform to established requirements, but could not find any evidence supporting that claim in the attached documents.

37. The Panel noted the Appellant's claim that he was not given fair consideration and that he was more suited to the post than the chosen candidate. The Panel indicated that it was not in a position to judge the merits of each candidate, and that it appeared that the decision taken by the departmental committee was fully explained.

38. The Panel noted the Appellant's claim that the post had been classified at the P-5 level, thereby placing the chosen candidate on an equal footing with the Appellant, and that the post should have been classified at the D-2 level.

39. The Panel acknowledged the right of UNDP to reorganize and redefine the duties and levels of posts. In addition, the Panel noted that the reorganization of UNDP and redefinition of the post did not fall within the scope of its mandate.

40. The Panel examined the Appellant's claim that the interview team for the post included, among others, two persons, whom the Appellant considered to be biased as a result of [a] September 1998 incident. The Panel found that it was impossible to determine on the basis of the evidence before it whether such bias existed.

41. Moreover, the Panel maintained that it was beyond its scope of authority to determine whether the Appellant was more suited for the post than the selected candidate.

42. The Panel found merit in the Appellant's argument that in the final phase of the selection process UNDP should have obtained the approval of the [Appointment and Promotion Board (APB)].

43. The Panel noted that the decision taken in the case had not been approved by the APB, according to the regulations and standards of the United Nations and UNDP. The Respondent did not deny this contention raised by the Appellant.

44. The Panel noted that UNDP, as an organization affiliated with the United Nations, is completely subject to its regulations, rules and standards. It also noted that appointments to posts at P-5 level and above, in the United Nations require approval by the APB in accordance with Staff Rule 104.14, without exception. This rule is applicable to any organization affiliated with the United Nations, including UNDP.

45. The Panel found that absence of APB approval of the appointment was a violation of ... due process. The Panel was unconvinced by the Respondent's claim that UNDP had its own rules and UNDP is not exempt from [the] requirement to seek APB approval for promotions or appointments at the P-5 level and above.

47. The Panel found that UNDP failed to follow its own rules in the matter. The Panel also noted that neither the Executive Review Team nor the Departmental Panel could validly be substituted for the APB.

Conclusions and Recommendation

48. Moreover, the Panel ***unanimously agreed*** that the case under consideration was not a regular promotion case, insofar as the Appellant, being at the D-1 level, had not applied for a D-2 level post, but for a post at his current level. There could therefore be no question of compensation.

49 The Panel ***unanimously agreed*** that the Appellant had endured pain and suffering, as a result of the failure by UNDP to follow the selection process prescribed by the rules in force and more specifically by the failure to submit the decision for the approval of the APB.

53. The Panel attempted to assess the compensation that would be fair in view of the suffering endured by the Appellant as a result of the violation of his due process rights. The Panel ***unanimously agreed*** that the Appellant should be recompensed as follows:

(i) One month's salary, for the violation of due process in not submitting the selected decision for approval by the APB.

(ii) Two months' salary for the suffering and pain the Appellant endured."

On 28 May 2003, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General regrets that he cannot agree with the JAB's conclusion that the final phase of the selection process violated due process when the case was not referred to the APB in accordance with Staff Rule 104.14. Staff rule 104.14 exempts from its provisions "those specifically recruited for service with any programme, fund, or subsidiary organ of the United Nations to which the Secretary-General has delegated appointment and promotion functions". The heads of such organs "may establish boards whose composition and functions are generally comparable to those of the [APB] to advise him in cases of staff members recruited specifically for service with those programmes, funds or subsidiary organs". UNDP has indeed established an APB and review by that body is sought in new appointments, conversions of category (from National Officer to International Professional; from local staff at Headquarters to the Professional category), new appointments of JPOs within six months of separation from UNDP, and other UNDP staff holding 200 or 300 Series professional appointments. As the selection process in this instance involved neither a new appointment, nor a promotion, nor a conversion of category, it did not require review by the APB. This selection process was governed by UNDP's reassignment policy, in effect since 1995 and consistently applied since that time. UNDP has fully complied with all the procedures set forth in that policy. In light of the foregoing, the Secretary-General cannot accept the JAB's recommendation for compensation and has decided to maintain the contested decision and take no further action on your appeal."

On 18 August 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of the JAB to reach conclusions without conducting a "fair" review of the merits of the case, to change unilaterally its own rules of procedure without notifying the Applicant and to ignore most of the evidence, testimony and contentions offered by the Applicant violated staff rule 111.2 (m) and constituted a fundamental denial of justice.

2. The UNDP Administration violated staff regulations 1.2 (b) and (j) and the rules on professional ethics approved in the United Nations Basic Principles on the Role of Lawyers by deciding, from September 1998 onward, to bring pressure to bear on the Applicant, a lawyer by profession, and to subject him to mental duress.

3. The decisions of the UNDP Administration deprived the Applicant of the opportunity to exercise his profession and constituted a malicious misuse of procedure.

4. The decisions to arbitrarily impose unjustified and secret restrictions on the functions of the APB and not to submit the Applicant's candidacy to APB were discriminatory, in bad faith, tainted by substantive and procedural irregularities, ill-founded in fact and in law and constituted maladministration.

5. The decision by the UNDP Administrator to replace the Applicant and to appoint a candidate with no professional qualification as a lawyer or jurist to head the Legal Section of UNDP violated Article 101, paragraph 3, of the Charter of the United Nations and the Applicant's rights and conditions of employment.

Whereas the Respondent's principal contentions are:

1. The Administration has the discretion to decide on its structure and there was no abuse in this instance in the exercise of that discretion.

2. The Administration has the discretion to select its staff and there was no abuse in this instance in the exercise of that discretion.

3. The Applicant provides no evidence of improper motives.

4. There was no need to consult the APB. The selection of the other candidate as Director, OLPS, was neither a new appointment, nor a promotion, nor a

change of category; there was therefore no obligation in this instance to apply to the APB.

5. The Joint Appeals Board conducted a fair review.

6. The Applicant's pleas are unfounded and/or inadmissible.

The Tribunal, having deliberated from 2 to 24 November 2004, now pronounces the following Judgement:

I. This case arises from an internal reorganization within UNDP, as a result of which a new service was established, OLPS, merging two previous services, the Legal Section of the Office of Human Resources and the Policy and Control Unit. Prior to that, the Applicant had been Chief of the Legal Section and Mr. S., who was chosen as the first Director of the new OLPS, had been in charge of procurement.

II. The Applicant claims that, from September 1998 on, when he expressed reservations about an irregularity in the appointment of the Deputy Chief of the Legal Section at UNDP, he suffered obstruction and harassment in the discharge of his official duties. In the summary of the Applicant's complaints given in his Application, he says that "[f]rom July 1999, with the appointment of a new Administrator of UNDP and his new management team, the Applicant began to be subjected to pressure and undue influence, accompanied by the pseudo-re-engineering of his post, followed by the establishment of OLPS without any consultation, and culminated in the irregular appointment of Mr. S. to the post of Director of OLPS, all of which was capped by the secret abolition of the Applicant's post".

III. The Applicant's main complaints relate in part to the procedure followed in carrying out the restructuring and in part, and more importantly, to the procedure followed in choosing the new Director. Other complaints concern alleged irregularities in the rebuttal of his PAR rating before the rebuttal panel and in the procedure before the JAB. Some of his requests - for example, that the Secretary-General should establish "a protection mechanism to ensure the reliability, professionalism, integrity and independence of lawyers working within the administration of justice at the United Nations" - are completely outside the competence of the Tribunal and thus will not be addressed.

IV. With regard to the restructuring, the Tribunal recalls that it has consistently held that the reorganization of administrative services falls within the discretionary powers of the Administration (see Judgements No. 350, *Raj* (1985); No. 639, *Leun-Ki* (1994); and No. 799, *Kartsev* (1995). The Tribunal's findings in *Raj* particularly pertinent here:

> "I. The Applicant considers that the UNDP Administration acted in a discriminatory manner towards him when it decided to reorganize the office in which he worked, reducing the number of units previously existing from three to two.
>
> II. The Tribunal has previously held that decisions of this nature fall within the discretionary powers of the Administration and that it is not within the Tribunal's competence to examine whether a given office should be organized in any particular way or whether better results would be obtained if a reorganization took or failed to take place (Judgement No. 117, *Van der Valk* [(1968)])."

Of course, the Tribunal will verify, as it always does, that discretionary powers have not been exercised arbitrarily, as it also indicated in *Raj*:

> "III. According to the Tribunal's consistent jurisprudence, the only possibility for a staff member to challenge a decision of the Administration on these matters is to prove that such a decision was vitiated by prejudice or some other improper motive.
>
> IV. The mere fact that a reorganization may hinder the prospects or in any way affect the career of a staff member does not necessarily point to the existence of discrimination or improper motives in the Administration and thus does not in itself give grounds for any claim against the decision taken."

V. The Tribunal notes, first of all, that many criticisms were raised during the course of the reorganization process. Although it does not appear that the Consultative Group on Staff Matters was formally consulted and asked to comment on the proposed reform, the UNDP Staff Council expressed its views and said that it was very concerned about the establishment of the new structure; it indicated, as reported in a memorandum dated 28 April 2000, that the new office could give rise to a number of conflicts of interest, namely:

> "– the possible conflict of interest arising from merging the regular procurement functions with legal functions;
>
> – the possible conflict of interest of having any kind of audit functions situated in OLPS; and, finally,

> – the perceived conflict of interest of the function reporting to the Director[, Bureau of Management], who also has management responsibility and accountability for the Human Resources management function in the organization".

Moreover, in a letter dated 14 July 2000, the Council said that "[a]lthough the Staff Council agreed not to question structural decisions and to concentrate on implementation, we cannot do so in this case because structure is key to an independent internal justice system". The Administrator recognized that there was some basis to these criticisms when he said, in his letter dated 2 August 2000, "it is important to ensure that the functions of OLPS be clearly delineated, and that any possible conflict of interest (and, to the extent possible, even perception of such conflict) be avoided". The Tribunal notes, however, that, contrary to the accusations of the Applicant that the reorganization was planned in the greatest secrecy, the Administration consulted the Applicant about the project and gave him an opportunity to submit his comments on the proposed changes. In fact, a letter dated 12 April 1999 states that "[d]uring the reform stage of UNDP [the Applicant] had many discussions ... on where the UNDP internal justice system stood".

VI. It is true, as the Assistant Administrator and Director, Bureau of Management, in the above-cited letter dated 28 April 2000, addressed to the Administrator acknowledged: "I do not dismiss that there could be situations of conflict of interest between the procurement advisory function and the legal function". Although it may seem surprising, viewed from the outside, that the same office should be in charge of concluding procurement contracts and of taking the legal measures necessitated by irregularities in such contracts, the Tribunal notes that in March 2000, the Office of Legal Affairs of the United Nations Secretariat, was consulted about the establishment of the Office of Legal and Procurement Support and the new job description for its Director, and that in April 2000, the Office of Legal Affairs suggested amendments, which were incorporated by the Assistant Administrator and Director, Bureau of Management, in his proposal. In other words, the restructuring had the endorsement of the legal officers in the Secretariat. The Tribunal has not found sufficient evidence in the file to call into question such an administrative reorganization, which falls within the management powers of the Administration. Although the reorganization did arouse some tension - more or less inevitable in such a process - the Tribunal does not find sufficient evidence in the file to conclude that the reorganization constituted an abuse

of power, or that it was done not to improve the functioning of UNDP but for improper motives. In other words, to conclude consideration of this first complaint of the Applicant, the Tribunal finds that, although the reorganization at UNDP may possibly be open to criticism from one side or another, the Applicant has not shown that the reorganization was carried out for improper or discriminatory motives.

VII. With regard to the procedure for selecting the new Director, the fact that the reorganization as such is not censured by the Tribunal does not necessarily mean that its implementation, which resulted in the elimination of the Applicant, might not have been effected in a manner that violated the Applicant's rights. With respect to the procedure followed in choosing the new Director, it is the Tribunal's consistent jurisprudence that it cannot substitute its assessment for that of the Secretary-General in relation to the evaluation of a candidate. In paragraph VI of Judgement No. 594, *Del Rosario-Santos* (1993), the Tribunal held that "the assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent. ... [T]he Tribunal can[not] substitute its evaluation for that of the Respondent" (see also Judgements No. 828, *Shamapande* (1997), and No. 470, *Kumar* (1989)). Nor can the JAB do so, as it indicated in its report:

> "37. The Panel noted the Appellant's claim that he was not given fair consideration and that he was more suited to the post than the chosen candidate. The Panel indicated that it was not in a position to judge the merits of each candidate, and that it appeared that the decision taken by the departmental committee was fully explained.
>
> ...
>
> 39. ... In addition, [the Panel] noted that the reorganization of UNDP and redefinition of the post did not fall within the scope of its mandate."

However, the Tribunal has always reserved the right to verify that the Administration's discretionary power of appointment was not exercised in an arbitrary manner and, in particular, that the established procedures were followed (see Judgements No. 1056, *Katz* (2002) and No. 1122, *Lopes Braga* (2003)).

VIII. Therefore, the Tribunal, like the JAB before it, must closely scrutinize the facts of the case to determine whether the Applicant's rights were violated in the process of selecting the new Director of OLPS.

IX. The Applicant's complaints relate to all stages of the selection process. The Tribunal will outline here the main steps in the procedure. The selection panel for the new post of Director of OLPS met on 11 July 2000 and interviewed the two short-listed candidates: the Applicant, who was at the D-1 level and was Chief of the Legal Section, responsible in that capacity for the internal justice system at UNDP, and Mr. S., who was at the P-5 level and was Chief of the Policy and Control Unit, Inter-Agency Procurement Services Office. On 7 August 2000, the panel's recommendation was submitted to the Executive Team, consisting of senior managers of UNDP and chaired by the Administrator. On that same date, the Applicant was informed by the Assistant Administrator and Director, Bureau of Management, that he had not been selected for the post. According to the Applicant, he was told by the APB that no candidacy had been submitted to it prior to the announcement of the appointment of the new Director. On 12 October 2000, the Applicant wrote to the Administrator requesting a review of the decision not to select him as Director, pointing out that "[an] APB peer review is essential for a final, full and fair analysis of the candidates, and to ensure that objectivity, transparency and due process prevail in the final recommendation to the Administrator". When the Administration refused to reconsider its decision, the Applicant lodged an appeal with the JAB. The Applicant alleged procedural irregularities at every stage, including the reorganization of the service, the vacancy notice, the level assigned to the post, the composition of the selection panel and consultation with APB. The JAB presented its report on 10 April 2003. In its report, the JAB did not find merit in some of the Applicant's complaints, notably the complaint of bias against him on the part of two members of the selection panel, but it did agree that in the final phase of the appointment process the candidacy should have been presented for approval to APB. In other words, the JAB felt that the Administration had not followed the procedures established for the appointment of the new Director, although it recommended only three months' salary by way of compensation to the Appellant. However, the Officer-in-Charge of the Department of Management informed the Applicant by letter dated 28 May 2003, that the Secretary-General could not accept the JAB's recommendation for compensation and had decided to maintain the contested decision. It is that decision that the Applicant is appealing to the Tribunal.

X. Before examining the merits of the claim, the Tribunal believes it will be useful to recall the positions of the two parties before the JAB, as well as the Board's

reasoning, all of which the Tribunal will need to review, concerning the procedure that should have been followed by UNDP with regard to the type of appointment in question. The Applicant felt that the existing rules required the candidacy to be presented to the APB. The Administration, on the other hand, maintained that UNDP had its own rules and that it was exempt from the obligation to present appointments or promotions to posts at the P-5 level and above to APB. On that point the JAB agreed with the Applicant, stating the position very clearly:

> "42. The Panel found merit in the Appellant's argument that in the final phase of the selection process, UNDP should have obtained the approval of the APB.
>
> 43. The Panel noted that the decision taken in the case had not been approved by the APB, according to the regulations and standards of the United Nations and UNDP. The Respondent did not deny this contention raised by the Appellant.
>
> 44. The Panel noted that UNDP, as an organization affiliated with the UN, is completely subject to its regulations, rules and standards. It also noted that appointments to posts at P-5 level and above in the United Nations require approval by the APB in accordance with Staff Rule 104.14 without exception. This rule is applicable to any organization affiliated with the UN, including UNDP.
>
> 45. The Panel found that the absence of APB approval of the appointment was a violation of due process. ...
>
> 46. The Panel considered that, even under the UNDP reassignment exercise, there was no justification for not submitting decisions for approval of the APB. ..."

The Tribunal thus notes that the JAB considered that the APB should have been consulted, whether the appointment of the Director was viewed as a straight appointment or a reassignment.

XI. To determine whether, as the JAB thought, the rules in force required presentation to APB, the Tribunal will now examine the procedures applicable to appointments and reassignments at UNDP.

XII. With respect to the appointments of United Nations staff members, staff rule 104.14 applies:

> "An Appointment and Promotion Board shall be established by the Secretary-General to give advice on the appointment, promotion and review of staff in the General Service and related categories and in the Professional category, and on the appointment and review of staff at the Principal Officer level,

> except those specifically recruited for service with any programme, fund or subsidiary organ of the United Nations to which the Secretary-General has delegated appointment and promotion functions. ... The heads of the organs referred to above may establish boards whose composition and functions are generally comparable to those of the Appointment and Promotion Board to advise them in the case of staff members recruited specifically for service with those programmes, funds or subsidiary organs."

It appears from staff rule 104.14 (a), quoted above, that there are general rules, given later in the staff rule, that apply to all staff members except those of the funds, programmes or subsidiary organs. Staff rule 104.14 (f), which applies to the general case, stipulates that the functions of APB relate to (i) appointment, (ii) review of the status of a staff member, (iii) promotion and (iv) transfer or reassignment. As a United Nations programme, however, UNDP is subject to special rules, and staff rule 104.14 (f) does not apply per se to UNDP staff members.

XIII. With respect to appointments of UNDP staff members, the Tribunal must now determine what rules are applicable to UNDP staff members. Staff rule 104.14 leaves the question open, since the Staff Rules are not directly applicable to UNDP. The Tribunal notes that the information given by the Respondent in a letter dated 10 November 2004, in response to questions from the Tribunal is not quite accurate when it states that UNDP is subject to the United Nations Staff Rules and does not issue its own Staff Rules or amend the United Nations Staff Rules. In fact, UNDP has adopted at least two special rules. By staff rule 1 of 28 April 1971, UNDP decided that the United Nations Staff Rules would apply to it and it explicitly indicated without any possible ambiguity that any derogation from them could only be through the establishment and publication of special rules:

> "... pending the framing by the Administrator of staff rules for UNDP, the staff rules of the United Nations shall continue to apply to UNDP staff with such *ad hoc* special provisions as the Administrator may establish and publish in the new DP/AB/Staff Rules series of instructions."

To date, it appears that only one other special rule has been adopted, in UNDP/AB/Staff Rules/2 dated 16 October 1973, establishing the Consultative Group on Staff Matters. The Tribunal notes, however, that an APB was established specifically for UNDP, with its own guidelines. In the Revised Guidelines for the APB, it is stated that the Board was created in implementation of staff rule 104.14: "The Appointment and Promotion Board is an advisory body established by the

Administrator ... under the provision of Staff Rule 104.14 for the purpose of making recommendations in respect of all staff members under the 100 Series of the Staff Rules ...". The Guidelines go on to stipulate that this APB shall make recommendations concerning the following situations: appointments, including extensions of contracts, change of category, promotions and review. The Tribunal notes that reassignments are not explicitly mentioned.

XIV. It remains to be determined whether the recruitment of the new Director should be considered an appointment or a reassignment. If the selection of Mr. S. is considered to be an appointment, it is undisputable that under the special guidelines adopted by UNDP in application of staff rule 104.14 the appointment was vitiated by a procedural irregularity. However, the Administration maintains that it was not an appointment but a reassignment, as it explained to the Applicant in the letter informing him that it was rejecting the conclusions of the JAB:

> "UNDP has indeed established an APB and review by that body is sought in new appointments, conversions of category (from National Officer to International Professional; from local staff at headquarters to the Professional category), new appointments of JPOs within six months of separation from UNDP, and other UNDP staff holding 200 or 300 Series provisional appointments. As the selection process in this instance involved neither a new appointment, nor a promotion, nor a conversion of category, it did not require review by the APB. This selection process was governed by UNDP's reassignment policy, in effect since 1995 and consistently applied since that time."

In other words, UNDP maintains that it was in fact a reassignment, and that it is clear from the documents establishing the APB specific to UNDP (and UNFPA) that it is nowhere explicitly stated that the Board must be consulted for reassignments, which are subject to a special policy. That is true, but in the Tribunal's view the texts and practice cited by the Administration as applicable to reassignments should be carefully scrutinized to determine whether the way in which UNDP excepted reassignments from the provisions of the Staff Rules is in fact proper.

XV. According to the Respondent, as explained in a letter dated 26 October 2000 addressed to the Applicant, informing him that the Administration would not reconsider the appointment, "UNDP applied *its operating procedures* with regard to reassignment that are currently in effect" (Tribunal's emphasis). Similarly, the Respondent states in his reply that:

> "UNDP abided by the procedures provided for in the reassignment policy and the Applicant's candidacy was given full and fair consideration: a vacancy announcement was posted; the Applicant was interviewed by a selection panel; the findings of the panel were submitted to the Executive Team for its consideration and decision; and the Applicant was duly informed of the decision." (Emphasis added by the Tribunal.)

In other words, the Respondent considers that for a reassignment it is sufficient to consult what it calls "the Executive Team", whereas the JAB found that insufficient. To support its argument that consultation of ABP was not necessary, the Respondent cites a UNDP announcement concerning reassignments, dated 10 April 2000 (repeating an announcement of 23 March 2000 on the same subject), which in its view provides for a recommendation from ABP only for posts up to the P-4 level, but not for posts at a higher level. In support of that argument the Respondent quotes from the announcement concerning the reassignment exercise:

> "All posts in RE 2000 classified at the ICS-9-11 (P-2 to P-4) levels are open to National Officers, local staff in Headquarters at the ICS-6 and ICS-7 levels, JPOs who are within six months of separation from UNDP and other UNDP international staff who hold 200 ('L') and 300 series (ALD) contracts at the professional level.
>
> Candidates who are short-listed by management from these categories of staff will be requested to provide a copy of their 1999 Performance Appraisal Review (PAR) form and will undergo a corporate panel interview organized by OHR prior to the decision-making meeting. The interview will assess the candidate's overall readiness for an international career, based on generic competencies established for a UNDP development professional, as well as any special requirements of the post. Those candidates who are successful in the panelling process will be considered for selection and approval of senior management at the RE 2000 decision-making meeting. The appointment of the selected candidate will then be presented to the Appointment and Promotion Board."

The Respondent notes in his Reply, "[t]hese passages show clearly that only candidates for ICS-9-11 posts would be presented to APB. Mr. S. was not in that category".

XVI. The Tribunal must express its surprise at that presentation. It is undeniable that any party to a proceeding must try to marshal the best arguments to support its position, but in this case the passages quoted by the Respondent could appear to be a manipulation of the texts designed to mislead the Tribunal. The Tribunal wishes to stress that it is not acceptable to extract matter from a circular in such a way as to make

it appear to say the opposite of what it actually does say. The document in question in fact announces the creation of various posts to be filled at the D-2, D-1, P-5 and P-4 levels upon the establishment of OLPS. Then in the next three paragraphs it sets out the conditions for applying to these various posts open in the context of the 2000 Reassignment Exercise (RE 2000); only the third of these paragraphs concerns the P-2 to P-4 posts. There follows a paragraph setting out the procedure for "candidates which are short-listed from these categories of staff", that is, those referred to in the foregoing three paragraphs: submittal of a copy of the 1999 PAR, interview before a panel, approval by senior management and presentation of the candidacy to the APB. If, as the Respondent maintains, this announcement sets forth the procedure to be followed for all future candidates for posts allocated to the 2000 Reassignment Exercise, then it must be acknowledged that the procedure announced was not followed by the Respondent, and the Tribunal cannot accept the Respondent's statement that it "abided by the procedures provided for in the reassignment policy".

XVII. Moreover, a policy different from that described by the Respondent was followed with respect to other "reassignments". The Tribunal asked the Respondent for certain information, in order to obtain a clearer picture than it could derive from the documentation submitted, on the policy actually followed with regard to the presentation of candidacies to APB. The Respondent sent its answers in a letter dated 10 November 2004, accompanied by annexes, from which it emerges, among other things, that the Applicant's appointment in 1992 was presented to APB, as was his reassignment in 1996 from a P-5 post as Legal Adviser, Department of Management, to the post of Chief, Legal Section, UNDP, also at a P-5 level. The Tribunal is therefore far from convinced that the policy whereby reassignment to a P-5 post did not need to be submitted to ABP was the policy in effect at UNDP at the time the new post of Director of OLPS was filled, and the failure to present the candidacy of the selected staff member to ABP cannot be justified on the basis of this supposed policy, which exists nowhere in the Respondent's documentation and was followed only for the appointment to the post of Director of OLPS.

XVIII. However, the Tribunal would like to go further and state that, even if UNDP truly had such a policy, it would have been in violation of the rights accorded to UNDP staff members by the United Nations Staff Rules, acknowledged as applicable by UNDP staff rule 1 and not subsequently amended. The procedure followed in the case

in question must therefore be censured by the Tribunal as not in conformity with the applicable rules. It is true that, according to the letter of the texts establishing ABP in implementation of staff rule 104.14, it does not appear to be required to consult ABP in the case of reassignments. The Tribunal holds that such a derogation from the United Nations Staff Rules could only have been validly effected through the adoption and publication of an explicit UNDP rule to that effect. Since the establishment of ABP did not take place through the issuance of such a rule, it would seem that it should not derogate from the principles and procedures set forth in the United Nations Staff Rules.

XIX. The Respondent cites other documents to justify not presenting reassignments to APB. The Personnel Manual, Revised Edition of May 1995, Section 20303, entitled "Reassignment", states in subsection 2.0 that "UNDP policy on reassignment of internationally-recruited staff is governed by the Staff Regulations and Staff Rules". Subsection 3.8 sets forth the procedure for reassignment:

> "3. Decisions concerning reassignments are taken by the Administrator and Associate Administrator in consultation with senior management. ...
>
> 4. Following the decision-making process, the Division of Personnel notifies participating staff members of the outcome of the process and seeks their formal concurrence before processing the reassignments."

According to the Respondent, subjecting reassignments to consultation with senior management implies the exclusion of presentation to ABP. The Tribunal considers that the establishment of a specific procedure for consultation with senior managers within UNDP concerning reassignments, to emphasize their importance, does not necessarily rule out subsequent consultation of ABP, as is required by the United Nations Staff Rules and not contradicted by the UNDP staff rules. The two procedures could readily coexist, and one should not be substituted for the other, as the JAB recognized, stating: "The Panel also noted that neither the Executive Review Team nor the Departmental Panel could validly be substituted for the APB".

XX. In conclusion, the Tribunal holds that whatever the procedure that was followed at UNDP, to recruit the Director of OLPS without presenting the selected candidacy to the APB was contrary to the guarantees accorded by the United Nations Staff Rules to United Nations staff members.

XXI. This serious procedural irregularity, as the Applicant sees it, was just one aspect of a broader pattern of biased treatment of the Applicant by the Administration. The file is full of examples cited by the Applicant as demonstrating, in his view, highly discriminatory treatment against him. The Tribunal recalls that it had occasion earlier, in its Judgement No. 1123, *Alok* (2003), paragraph XIII, to express its concerns about what was happening at UNDP in relation to the treatment of the Applicant:

> "The Tribunal was also alarmed that, allegedly, efforts were made by the Administration to hinder the investigation of issues related to the responsibility of the UNFPA Headquarters with respect to irregularities and mismanagement that took place in the Nepal office. The Tribunal's apprehensions arise from the alleged improper removal of a legal advisor involved in, and concerned with, the investigation, as well as from the alleged, unexplained disappearance of documents relating not only to the issues of the Headquarters' responsibilities but also to the case at hand. The Tribunal expresses no view as to the merit of the allegations; however, the Tribunal feels that such allegations deserve further investigation by the appropriate United Nations authorities."

The Tribunal has examined each allegation in detail. It will discuss here only the cases in which, in the Tribunal's view, conduct tainted with bias towards the Respondent was demonstrated. Of the many incidents cited by the Applicant for which the evidence provided did not convince the Tribunal, it will mention only a few examples in which discriminatory treatment cannot be considered proved.

XXII. The Applicant argued, to begin with, that the selection panel procedure violated his due process rights in that, according to him, "two persons involved in awarding [the] rating of 4" on his 1998 PAR were sitting on the panel. The Applicant had filed for a rebuttal hearing on that PAR before a rebuttal panel - a procedure that has not been completed to this day! The Tribunal is not focusing here on the outcome of the rebuttal procedure but rather on the consequences of the rebuttal in the process of selecting the new Director. The JAB did not find merit in the claim that the selection panel was improperly constituted:

> "40. The Panel examined the Appellant's claim that the interview team for the post included, among others, two persons whom the Appellant considered to be biased as a result of the September 1998 incident. The Panel found that it was impossible to determine on the basis of the evidence before it whether such bias existed."

On this point the Tribunal does not agree with the conclusions of the JAB. It is apparent from the file that there had been strong disagreements between the Applicant and two members of the panel, which did not allow for fair consideration of the Applicant.

Moreover, because a rebuttal procedure was in process against the rating given to the Applicant, the Associate Administrator had assured the Applicant, by letter dated 12 June 2000, shortly before the selection process that "in light of the current status of your 1998 PAR, the panel will have access to your PARs only through performance year 1997". Now, it is evident from the documents produced that at least one - but that is sufficient - of the members of the selection panel had been involved in the proceedings of the Management Review Group, which had to have known about the PAR that was not supposed to be known to the panel. That, too, was a violation of the Applicant's due process rights. With regard to the rating in question, the Applicant also asked the Tribunal:

> "TO AWARD the Applicant a rating of 1 for his Performance Appraisal Review (PAR) for 1998 should the Respondent fail to amend his assessment of the Applicant's performance, which assessment unduly influenced the decision of 7 August 2000".

Although the Tribunal deplores the fact that, six years after the Applicant's assessment, the rebuttal procedure still has not been completed, clearly it is not within the competence of the Tribunal to give a rating to a United Nations staff member. It can, however, take the unacceptable delay into account in determining the compensation owed to the Applicant.

XXIII. On other points, the Tribunal feels that the evidence submitted by the Applicant does not lead to the conclusion that his rights were violated. The Applicant says, for example, that his D-1 post was eliminated while he was on "reimbursable loan" without his being informed in advance, and he maintains that the elimination was in violation of the policy whereby the Administration does not eliminate a post while its incumbent is in such as situation. It does emerge from the documents in the file that, while the Applicant was on loan to the Department of Economic and Social Affairs (DESA) at United Nations Headquarters, his post was changed and became a P-5 post. However, the Tribunal notes that UNDP informed the Applicant by letter of 1

August 2002 that, if his assignment should end prior to his retirement date, UNDP promised to take him back:

> "With regard to the post of Chief, Legal Section, that you occupied before your loan to UN/DESA, the formal post description was updated within the context of the new structure of the Office of Legal and Procurement Support. As a consequence, the post has been reclassified at the P-5 level with the title of Legal Adviser-Human Resources.
>
> Finally, I wish to advise you that we have agreed to a continuation of your assignment with UN/DESA ... until 31 December 2002, the month you reach retirement age. ... However, in the event that you return to UNDP at an earlier date, you will remain under contract until 31 December 2002."

The Tribunal therefore cannot agree with the Applicant when he maintains that the way in which his status was handled while he was on loan to another department demonstrates "the same line of discrimination".

XXIV. The Applicant cites a long series of circumstances to show that improper motives vitiated the recruitment of his competitor. In particular, the Applicant suggests that he was discriminated against because of the firm legal position he took in prosecuting a number of misappropriation cases at UNDP and cites his differences with UNDP senior management over *Ragan* (Judgement No. 1066 (2002)), *Alok* (Judgement No. 1123 (2003)) and *Poudel* (Judgement No. 1153 (2003)) to show that there were "circumstances influencing the appointment of the Director of OLPS". As an example, the Applicant alleges that in *Alok* senior managers at UNDP:

> "... were constantly urging the Applicant to close the Nepal disciplinary cases immediately. The aim of this pressure was to avoid any investigation that might question their own management and the lack of a system of oversight for construction projects in Nepal."

The Applicant also refers to *Ragan* and alleges that pressure was exerted by senior management to ensure that Ms. Ragan was acquitted of the accusations against her and to sabotage his work as a lawyer and his legal analysis of the case. The Tribunal is convinced that the information submitted by the Applicant indicates that there were serious misunderstandings between the Applicant and other senior managers at UNDP. Those tensions undoubtedly had their origins in 1998 when the Applicant opposed the recruitment of the candidate for Deputy Chief, Legal Section, proposed by UNDP management, contesting the candidate's legal qualifications, saying that he claimed to

be a lawyer in Denmark but was actually only a law student/trainee. However, this evidence in itself is not sufficient to show discriminatory treatment of the Applicant with respect to the legal cases mentioned.

XXV. For these reasons, the Tribunal:

1. Finds that the recruitment of the Director of OLPS was carried out in violation of applicable procedures and in addition was vitiated by discriminatory factors;
2. Orders that the Applicant shall be paid 12 months' net base salary in compensation for all violations of these rights; and
3. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Brigitte **Stern**
Vice-President

Spyridon **Flogaitis**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary